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No. 873

In the Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA,

Petitioner,

vs.

SHELDON G. PERLMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The Court of Appeals rendered no opinion in reversing the judgment of conviction, other than to state that its judgment of reversal, was in view of the holdings of the United States Court of Appeals for the Seventh Circuit in the cases cited in the defendant-appellant's motion for judgment of reversal.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, Petition for Certiorari), was entered September 23, 1969. The Petition for Certiorari was filed November 21, 1969 under an extension of time for filing the Petition for Writ of Certiorari granted by Mr. Justice Marshall on October 1, 1969. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Does the assertion of the privilege against self-incrimination provide a complete defense to a charge of transferring marijuana not pursuant to a written order form, in violation of 26 U.S.C. 4742(a)?

2. Where the government fails to prove either the existence or non-existence of an order form prescribed by the scheme of laws governing marijuana transactions, insofar as the transaction prosecuted is concerned, must the defendant help convict himself by admitting he received no such order form, or assume a shifted burden of proof to show that he did receive one and thus incriminate himself in illegal traffic in marijuana?

3. Should the law contained in the opinion in *Minor* v. *United States,* No. 189, and *Buie* v. *United States,* No. 271, (38 L.W. 4019) decided December 8, 1969, be retroactive and apply to judgments of Courts of Appeal in other cases rendered before the decision of this Court in the *Minor* and *Buie* cases?

4. Do the statutes and regulations governing purchase and sale and distribution of marijuana within the United States require that a person located in Tangier, Morocco, obtain an order form before shipping marijuana to an individual in the United States?

STATUTES AND REGULATIONS INVOLVED

"26 U.S.C. 4742(a):

> It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Other relevant statutes and regulations are 26 U.S.C. 4741-4744, 4751, 4753-4755, 4761(4), 4771, 4773, 4774, 4775; 26 C.F.R. 152.63, 152.66, 152.105.

STATEMENT

After a jury-waived trial, the respondent was convicted in the United States District Court for the Northern District of Illinois, under a single-count indictment which charged that on or about March 15, 1966, Harold J. Dalton and Sheldon G. Perlman, the respondent, did unlawfully transfer approximately 24.583 grams of marijuana to Robert F. Bottorff, not in pursuance of a written order on a form issued by the Secretary of Treasury and prescribed by the Statute, Section 4742(a), Title 26 U.S.C. The indictment was returned on May 24, 1966.

On June 20, 1966, the co-defendant Harold J. Dalton entered a plea of guilty and was sentenced to the custody of the Attorney General for 5 years (R. 5, A. 5).

The respondent, Sheldon G. Perlman, was absent from the country at all times referred to in the indictment and for a long time thereafter, so that the case, on motion of the government, was stricken from the call with leave to reinstate after the conviction on plea of guilty of defendant Dalton (R. 9).

On December 11, 1967, the respondent Perlman entered a plea of Not Guilty, after his voluntary return to the country. He was given leave to file motions on or before January 1, 1968, and the cause was continued until January 22, 1968, to be set for trial (R. 11). On January 17, 1968, the respondent Perlman moved for the production of co-defendant Harold J. Dalton, who was presumably in custody, for an interview, and that motion was continued until January 22, 1968. The motion of the defendant Perlman was again continued until February 5, 1968, the government sought and obtained 15 days to answer Perlman's motions for particulars and for production, and the cause was continued until March 4, 1968 (R. 12, 13, 14). Dalton, however, had been deported by the government on January 2, 1968, and thereafter has never been found.

On April 18, 1968, the respondent Perlman filed a motion for disclosure of evidence obtained from and concerning the co-defendant Harold J. Dalton, and after hearing on May 3, 1968, the said motion was granted (R. 15, 16). On October 21, 1968, the Court denied the defendant Perlman's motion to dismiss the indictment because of the removal of an essential and participating co-defendant witness from the jurisdiction of the court by the United States; and the motion of the respondent to dismiss the indictment because barred by the invalidity of the statute under which it was brought, and motion to dismiss the indictment because the prosecution was in violation of the Fifth Amendment, were denied (R. 22).

The government proved in great detail the mailing to Agent Bottorff (undercover) in Chicago, Illinois, of a small packet of hashish (marijuana) enclosed in a Christmas card from Tangier, Morocco, where the respondent was

then living. The respondent was indicated by the proof as the mailer in Tangier. This Christmas card was received by Agent Bottorff on December 31, 1965.

This mailing of hashish from Tangier in December, 1965 was not prosecuted, and no notice of such proof was given in the single count indictment which prosecuted an alleged transaction on March 15, 1966. No other pleading indicated any claim of such a transaction.

The proof concerning the event charged in the indictment indicated receipt by Agent Bottorff of 24 plus grams of hashish from Dalton the co-defendant in Chicago, on March 15, 1966 (Gov. Ex. 21, Tr. 257-264). The proof shows that Bottorff paid Dalton one hundred dollars at the time of Dalton's delivery of it. While Dalton's conversations with Bottorff indicated that he had received the hashish in a French language magazine, which had been carved out to provide a hollow space which would hold the small package, Bottorff did not see the magazine before it had been opened and the hashish removed. Bottorff's version of Dalton's hearsay description of its receipt, was admitted over objection. Of course, Dalton, a leading participant, whose conversations with Bottorff were essential to the government's case, did not appear to confront the respondent, and was not available, because of Dalton's deportation.

The only proof that the hashish, mentioned in the charge, originated or was mailed from Tangiers to Chicago, was Dalton's hearsay to Bottorff (Tr. 112-118, Gov. Ex. 18, 19, 20, 21).

The only proof concerning the existence of "order forms" was Bottorff's statement that he did not give respondent Perlman such a form, nor did anyone, in his presence, ever give Sheldon Perlman such a form (Tr. 121).

On cross, Agent Bottorff said he did not know whether Dalton gave Perlman a request or form from the Treasury Department (Tr. 122).

Defendant's Group Exhibit 6, showed Dalton was paroled from prison for deportation on January 2, 1968 (Tr. 295-301).

The respondent did not testify. His motions for acquittal were denied, and he was sentenced to 5 years imprisonment.

REASONS FOR DENYING THE WRIT

1. The proof in the trial court showed that at all times involved in this prosecution, the defendant was a resident of Tangier, Morocco. Any conduct of his which in any way implicated him in this matter was therefore performed in a foreign country.

It is respectfully urged that the scheme of laws and regulations relied upon by the government for the regulation of domestic transactions and transfers of marijuana do not apply to a person who is not within United States territory.

The government's proof in the case at bar does not indicate or establish whether there was a treasury order form delivered to Perlman by Dalton, who was the alleged recipient of hashish from Tangier, Morocco on March 15, 1966. The only evidence tending to show anything about order forms is at Pages 121 and 122 of the transcript of proceedings as shown in the footnote below.[1]

---

[1] "Q. Did you ever give the defendant Sheldon Perlman a written order form for the transfer of marijuana issued in blank by the Secretary of the Treasury or his delegate?

"A. No.

"Q. Did anyone in your presence ever give the defendant Perlman such an order form?

"A. No.

* * *

"Q. Everything you have heretofore testified to, did this occur in Chicago, Illinois, the State of Illinois?

"A. Yes, sir.

"Mr. Breakstone: I have no further questions.

Cross Examination

"By Mr. Walsh:

"Q. Mr. Bottorff, of your knowledge, you don't know whether Mr. Dalton gave Mr. Perlman a request or a form from the Treasury Department; do you?

"A. Not of my personal knowledge, no, sir."

* * *

It is obvious that from this proof, the order form prescribed by statute and charged in the indictment to be nonexistent, may actually have existed and been delivered to Perlman under the record here. Surely, Perlman was under no obligation to prove that he had not received such a form, or for that matter, that he did receive a form. He elected not to testify. Indeed, whether a person in his status as a resident of a foreign country, could be required to secure and maintain such an order form when the form would prove and establish a violation of Section 176(a) of Title 21 forbidding the clandestine smuggling of marijuana into the United States, is very questionable.

The order form is not appropriate or applicable to the case at bar in the view of the respondent.

However, if it is to be considered that a non-resident of the United States must obtain and maintain for inspection in Tangier, Morocco, an order form showing his participation in unlawful smuggling of marijuana, then the form becomes self-incriminatory when applied to the facts in this case.

2. Throughout the pendency of this case in the District Court, the respondent urged the Judge to withhold final judgment until the cases of *United States* v. *Covington*, 395 U.S. 57 and *Leary* v. *United States*, 395 U.S. 6, were decided by this Court. The trial judge chose to disregard the *Covington* decision which was believed by counsel for the respondent to be appropriate and governing in the case at bar. When the matter reached the Court of Appeals for the Seventh Circuit, that Court had decided several cases—*Ward* v. *United States*, ... F.2d ..... (No. 16955, August 19, 1969, 7 Cir.), and *United States* v. *Reynolds*, ... F.2d ..... (No. 16921, September 2, 1969, relying

upon *Marchetti* v. *United States,* 390 U.S. 39, *Grosso* v. *United States,* 390 U.S. 62; and *Haynes* v. *United States,* 390 U.S. 85), the Supreme Court's decisions in *Leary* v. *United States,* 395 U.S. 6, and *United States* v. *Covington,* 395 U.S. 57. The Government failed to file its brief, although its time had expired three times, stating that it wished to withhold its brief until this Court had decided *Buie* v. *United States,* No. 271, October Term 1969. It is respectfully suggested that the *Covington* decision is good law and is applicable to the case at bar even though the respondent is alleged to be a supplier, since to compel him to maintain a written order form issued by the Treasury Department in Tangier for marijuana clandestinely sent to the United States, would obviously incriminate him under 21 U.S. 176(a).

It is also respectfully suggested that this Court, in the *Buie* decision, did not have before it the question of incrimination under 21 U.S.C. 176(a).

The respondent urges that he was not subject to the statute under which he was prosecuted since he was a foreign resident, and the statute had no effect in Tangier, Morocco; and that observance of Title 26, Section 4742, and associated statutes requiring the maintenance of the record, would certainly tend to incriminate him if the facts purported to have been proved by the government are true.

Unquestionably, the transfer statutes requiring order forms are confined to transactions within the United States. *Thomas* v. *United States,* 314 F.2d 936, 939 supports this view and holds that one who brings marijuana into the United States from Mexico is not subject to the order forms

and transfer tax provisions because those sections contemplate a transfer within the United States. To the same effect, is *Marquez-Anaja* v. *United States*, 319 F.2d 610.

It is further urged that the charge against the defendant is the "transfer" of marijuana not pursuant to an order form in violation of Section 4742. Title 26, Section 4761(4) provides as follows:

> " * * *
>
> "(4) *Transfer or transferred.*—the term 'transfer' or 'transferred' means any type of disposition resulting in a change of possession, * * *"

It would appear that Perlman had accomplished a type of disposition resulting in a change of possession when he sent the hashish (marijuana) to Dalton. His act occurred in Tangier, Morocco.

Further, any doubt on this question seems to be dispelled by the provisions of Section 4774 of Title 26 which provides that the provisions of Sections 4701 to 4704 inclusive, and sections 4721 to 4776 inclusive, should apply to the several states, the District of Columbia, and the insular possessions of the United States, and in the case of narcotic drugs, shall also apply to the trust territory of the Pacific Islands and to the Canal Zone.

The respondent Perlman performed all acts in which he was involved under the evidence in Tangier, Morocco, and did not return to the United States for a substantial period of time thereafter. He was not subject to prosecution or conviction since the Sections are specifically inapplicable by statutory statement to Morocco (26 U.S.C. 4774).

The Court is respectfully urged to deny the government's Petition for a Writ of Certiorari, but suggests that if this Court sees fit to grant the Writ of Certiorari and to reverse the *per curiam* order of the Court of Appeals, which ruled upon a single one of the several substantial points made by the respondent in his appeal to the Court of Appeals, the case should therefore be remanded to the Court of Appeals so that the United States could be required to file its brief in that Court as provided by law.

Respectfully submitted,

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December 1969.

SUPREME COURT OF THE UNITED STATES

October Term, 1969

UNITED STATES *v.* SANTOS, ET AL.; and
UNITED STATES *v.* PERLMAN

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 861 and 873. Decided February 24, 1970

PER CURIAM.

The petitions for writs of certiorari are granted, the judgments are vacated and the cases are remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Buie* v. *United States*, 396 U. S. 87.